Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc. *and* International Union of Operating Engineers, Local 564, AFL-CIO. Cases 23-CA-8054, 23-CA-8074, 23-CA-8106, 23-CA-8115, 23-CA-8169, and 23-RC-4913

July 29, 1982

DECISION AND ORDER

On July 10, 1981, Administrative Law Judge Gerald A. Wacknov issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel and the Charging Party filed briefs in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc., Clute and Freeport, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election in Case 23-RC-4913, held on October 10, 1980, be, and it hereby is, set aside, and that case is hereby remanded to the Regional Director for Region 23 for the purpose of scheduling and conducting a second election at such time as he deems appropriate.

[1] Respondent's handbook for employees contains a no-solicitation/no-distribution rule, which even Respondent concedes is invalid. The handbook also contains a rule which prohibits solicitation "on working time," which the Administrative Law Judge implicitly found to be valid, thereby leading to the conclusion that both rules are invalid because the "working time" rule is inconsistent with the invalid rule, and thus creates an ambiguity which reasonably would tend to inhibit permissible solicitation by employees who would be uncertain which rule would be enforced. Respondent contends, in its exceptions, that the Administrative Law Judge erred because it applied and enforced only the "valid . . . working time" rule. The issue is governed by *T.R.W. Bearing Division, A Division of T.R.W., Inc.*, 257 NLRB 442 (1981), wherein the Board found that a rule prohibiting organizational activity during working time is overly broad and invalid. Accordingly, we find, in agreement with the Administrative Law Judge, that both rules are invalid and violative of Sec. 8(a)(1) of the Act.

[2] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980). Member Jenkins would award interest on the backpay due based on the formula set forth therein.

CHAIRMAN VAN DE WATER and MEMBER HUNTER, concurring and dissenting:

Our colleagues find that Respondent violated Section 8(a)(1) of the Act by maintaining two invalid no-solicitation rules. We agree with our colleagues that Respondent's rule, set out at paragraph XIII of its employee handbook, which prohibits "soliciting . . . on company property," is an overly broad restriction on its employees' Section 7 rights.[3] However, we cannot agree with their conclusion that the no-solicitation rule set out at paragraph XXVI of Respondent's employee handbook likewise violates the Act.

The rule set out at paragraph XXVI states:

> It is the rule of the Company that unauthorized solicitation of employees or customers upon the premises or in the area of the plant or office by or on behalf of any club, society, labor union, religious organization, political party or similar association is strictly prohibited. This prohibition applies both to *employees on working time* and to outsiders, and it covers soliciting in any form, whether for membership, for subscription, or for payment of money. [Emphasis supplied.]

In finding this rule invalid, our colleagues state that a rule which prohibits organizational activity "during working time" is overly broad, and cite *T.R.W. Bearing Division, A Division of T.R.W., Inc.*,[4] as support for this conclusion. As we cannot ascribe to the views set out in *T.R.W.*, and as we believe the better view of the law is that set out in the majority opinion in *Essex International, Inc.*,[5] the case overruled by *T.R.W.*, we must dissent from our colleagues' finding paragraph XXVI of the handbook to be an invalid rule.

In *Essex* the Board majority drew what we think is a valid and significant distinction between no-solicitation and no-distribution rules which use the term "working hours" and those which use the term "working time." Thus the *Essex* majority observed that the term "working hours" connotes the period of time from the beginning to the end of a workshift. Therefore, the use of this term in any rule would reasonably be calculated to mean that employees were prohibited from engaging in union activity for their *entire* workday, including their break and lunch periods. This, the *Essex* majority found an overbroad restriction and therefore it concluded that rules using the term "working hours" are presumptively invalid. However, the

[3] See, e.g., *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962).
[4] 257 NLRB 442 (1981), herein *T.R.W.*
[5] 211 NLRB 749 (1974), herein *Essex*.

Essex majority also found that rules using the term "working time" connote different, and lawful, prohibitions on solicitation and distribution activities. Thus, the majority noted that the terms "work time" or "working time" connote that period of time spent in the performance of *actual* job duties, which, of course, would *not* include time slated for lunch or for break periods. Hence, the use of the term "working time" in a rule would clearly convey to employees that "they were free to engage in solicitation or distribution during lunch and break periods which occur during their 'working hours.'"[6] The *Essex* majority therefore determined that rules which prohibited solicitation or distribution during "work time" or "working time" are presumptively valid. We agree with this reasonable approach and distinction set out by the *Essex* majority.[7]

In sum, we would find a rule which prohibits solicitation or distribution during "work time" or "working time" to be presumptively valid, and we would require the party attempting to invalidate the rule to show by extrinsic evidence that, notwithstanding the rule's wording, it was enforced so as to restrict employees' union solicitation activities at a time when it was permissible for them to engage in such activities. Conversely, we would find a rule prohibiting solicitation during "work hours" or "working hours" to be presumptively invalid. We would allow evidence, however, to show that such a rule had been sufficiently clarified; i.e., that it had been communicated or applied in such a way as to convey an intent to permit solicitation during breaktime or other periods when employees are not actively at work.

In this case, since the rule in paragraph XXVI of the handbook limits its prohibition to employees who are on "working time," we would find the rule presumptively valid. Indeed, it is implicit in the Administrative Law Judge's analysis of the rule that he, too, found it facially valid. However, he further found that—

> . . . [t]o the extent that the no-solicitation rule enunciated in paragraph XXIV of the employee handbook is inconsistent with the rule reflected in paragraph XIII, such conflicting rules create an ambiguity which would reasonably tend to inhibit permissible solicitation by employees who would be uncertain of which rule Respondent intended to enforce. [*Infra*, 1432.]

Accordingly, the Administrative Law Judge ultimately concluded that the rule at paragraph XXVI is invalid and violated Section 8(a)(1). Assuming that an ambiguous situation may have existed here because of the conflicting no-solicitation rules, we do not see that as a reason to hold that the clearly valid rule set out at paragraph XXVI violates the Act. Rather, a simple cease-and-desist order directed to the invalid rule in paragraph XIII, coupled with an affirmative order to rescind that rule will suffice to remedy the unfair labor practice found. The Administrative Law Judge's analysis in concluding otherwise unwarrantedly intrudes on an employer's right to maintain even a lawful no-solicitation rule.[8]

In sum, we would find no violation of the Act in Respondent's maintenance of its rule at paragraph XXVI of the handbook, and we dissent from our colleagues' failure to so conclude.

[6] *Essex, supra*, 211 NLRB at 750.

[7] In overruling *Essex* in *T.R.W., supra*, the Board simply reached the contrary conclusion, i.e., that the terms "working hours" and "working time" were equally ambiguous, unless otherwise explained. This argument had already been correctly rejected by the *Essex* majority. Indeed, we note that the Board some 39 years ago in *Peyton Packing Company, Inc.*, 49 NLRB 828, 843 (1943), indicated that an employer could make reasonable rules covering the conduct of its employees, and further noted that "*working time* is for work." (Emphasis supplied.) If the Board could use the term "working time" in such a manner in *Peyton Packing*, we see no presumptive invalidity in an employer's likewise telling its employees they cannot engage in certain activities during "working time" since, as the Board itself has indicated, such time "is for work."

[8] In light of the number of instances of surveillance of union activities engaged in by Respondent, some of which occurred in the plant during the employees nonworking time, we do reject Respondent's argument that its admittedly invalid rule in par. XIII was sufficiently clarified. Indeed, with regard to the no-distribution portion of its invalid rule, that portion was specifically reaffirmed by Respondent during the organizing campaign.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge: Pursuant to notice, a hearing with respect to this matter was held before me in Angelton, Texas, on January 20, 21, and 22, 1981. The initial charge was filed on July 24,[1] by International Union of Operating Engineers, Local 564, AFL-CIO (herein called the Union). Additional charges were filed by the Union on July 31, August 25, September 3, and October 3, and amended charges filed on various subsequent dates.

On September 10, the Regional Director for Region 23 of the National Labor Relations Board (herein called the Board) issued an order consolidating cases and consolidated complaint and notice of hearing alleging violations by Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc. (herein called Respondent or Respondents), of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act). The aforesaid order consolidating cases was further modified by subsequent orders dated October 17 and November 18.

[1] All dates or time periods herein are within 1980, unless otherwise specified.

Pursuant to a representation petition filed on July 23 by the Union in Case 23-RC-4913, and following a Decision and Direction of Election issued on September 2, an election by secret ballot was conducted on October 10. The tally of ballots reflects that of the approximately 685 eligible employees, 152 cast ballots for the Union, and 443 cast ballots against the Union. Thereafter, the Union filed timely objections to the election. Pursuant to an order directing hearing and order consolidating cases and notice of hearing, dated October 2, the aforementioned objections were consolidated with the unfair labor practice proceeding for the purpose of hearing, ruling, and decision by an administrative law judge.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for Respondent, and counsel for the Union.

Upon the entire record and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondents are affiliated business enterprises engaged in the manufacture of medical and surgical devices and various other products, maintaining their principal facilities in Clute and Freeport, Texas, and constitute a single integrated business enterprise and a single employer within the meaning of the Act.

In the course and conduct of their business operations, Respondents annually sell and ship goods and materials valued in excess of $50,000 directly to firms located outside the State of Texas. It is admitted, and I find, that Respondents are now, and have been at all times material herein, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES AND ELECTION OBJECTIONS

A. *The Issues*

The principal issues raised by the pleadings are whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging some 35 employees because of their union activity, by engaging in surveillance of employees' union activity, by promulgating and enforcing an unlawful no-solicitation and distribution rule, and by various additional conduct; and whether as a result thereof and as a result of other alleged objectionable conduct, certain election objections should be sustained and a new election directed.

B. *Facts*

1. Background

Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc., are Texas corporations engaged in the manufacture and distribution of medical and surgical devices and other products. Intermedics primarily manufactures cardiac pacemakers and pulse generators, and has its principal facility in Freeport, Texas. Surgitronics primarily manufactures accessory products for the pacemaker lines that Intermedics produces, and maintains its principal place of business in Clute, Texas, approximately 6 miles from the Intermedics plant.

Russell Chambers is the president and chief executive officer and director of Intermedics. Chambers is also the sole director of Surgitronics. Steven Barton is the president of Surgitronics and reports directly to Chambers.

The Union commenced organizing the employees at the Surgitronics plant in July, and on July 23 filed a representation petition in Case 23-RC-4913 limited to a unit consisting only of the approximately 150 production and maintenance employees of Surgitronics. Thereafter, a representation hearing was held on August 11 and 12. On September 2, the Regional Director for Region 23 of the Board issued a Decision and Direction of Election wherein the unit was expanded to include essentially the approximately 685 production and maintenance employees of both Intermedics and Surgitronics.

2. Events at the Surgitronics facility

On Monday morning, July 21, following a union organizational meeting the previous evening, employees of Surgitronics were handing out union cards and talking to employees about the Union in the Respondent's parking lot. Similarly, such union activity was occurring in the lunchroom prior to work. Sue Daniels, a group leader in the Cyberlith department at Surgitronics, who had been employed since January 8, 1978, got about 10 employees to sign cards that morning prior to work which commenced at 7:30 a.m.[2] At or about 8:30 a.m., Security Guard Theresa Norris approached Daniels at her work station and informed her that Tom Anderson, director of manufacturing, had instructed Norris to search the women's purses for union cards. Daniels said she did not believe anyone had the right to do this without a search warrant. Norris agreed, but said that she had been told she would be fired if she did not search the purses.

During the course of the morning, Daniels collected union authorization cards from various employees who had similarly been soliciting employees to sign them in the lunchroom that morning, explaining that there was a chance their purses would be searched. At the 12:30 p.m. lunchbreak, Daniels stepped outside the door of the plant with employees Geraldine Reynolds and Debbie Mendez and handed 23 authorization cards to Reynolds. Daniels

[2] Employee Kenneth Miller similarly testified that he passed out union cards in the lunchroom on the morning of July 21, and that Supervisor Tony Monte was present and watched the employees while they were engaged in this activity.

testified that Security Guard Norris had followed the employees out the door and was watching them. Thereupon, Daniels told Norris that Daniels could do what she wanted to on her lunchbreak. Norris replied, according to Daniels, "I'm cool. I understand what you are doing, but I am telling you they're watching you." Daniels observed that two other security guards were standing at the plant window watching the group.[3]

Upon returning to work after lunch, Daniels observed Supervisors Billy Tabor, Tom Anderson, and Tony Monte standing outside the door of the quality control room, watching the employees. Similarly, Myron Ligon and Ray Albrecht commenced to watch the employees. The latter two individuals, who headed the personnel department for both companies and maintained their offices at the Intermedics plant in Freeport, would customarily come to the Surgitronics plant on Wednesdays, and Daniels had never known them "just come over and spend the day with us and meander around the plant."

Employee Cecilia Moody testified that on July 21 the employees were kept under constant surveillance by various supervisors who would congregate in groups and carefully observe the employees. Moody further testified that such conduct by supervisors was completely out of the ordinary.

Daniels testified that on the morning of July 22, apparently prior to work, she observed that supervisors Dale Wells and Tony Monte had conspicuously remained in the lunchroom and were noticeably attempting to overhear the employees' conversations. Customarily, according to Daniels, these supervisors get coffee from the lunchroom and take it to their office.

Later during the morning of July 22, Supervisor Billy Tabor asked Daniels to follow him to Barton's office and to bring her purse. Daniels did so. Barton asked her to hand her badge to the security guard who was present. Daniels asked whether Barton had a reason for this, and Barton said, "Yes. We no longer feel like you're happy with your job here." Daniels replied, "That's not so, because I love my job." Barton said, "Well, we don't feel like you do." He then asked Tabor to gather her personal effects because he did not want Daniels back in the plant. She was escorted out of the plant by the security guard.

That evening, Daniels phoned Tabor to inquire about the real reason for her discharge. Tabor said he could not talk to her about it. After much urging, Tabor asked if Daniels recalled the Shirley Fry incident which had occurred some 6 weeks before and said that this was the reason for her discharge.[4]

Mary Siegel became employed by Surgitronics on August 7, 1978. She worked in quality control and her supervisor was Doug Bromley. On Monday morning, July 21, at work, Siegel talked to employees about the Union and passed out authorization cards. At or about 10:30 a.m., Security Guard Norris, whom Siegel knew only casually, approached her and asked where she could get some cards as she had a friend who wanted to sign a card. Siegel feigned ignorance, and replied that she did not know what Norris was talking about.

The following morning, July 22, after attending a union meeting the preceding night, Siegel was approached by Supervisor Jim Glidewell, who advised Siegel to bring her purse to Barton's office. In the office were Barton and George Tumbleson, another security guard. Barton stated that Siegel was being discharged because on a previous occasion she had said she was going to quit. Siegel argued that the incident[5] he was referring to had occurred some 6 weeks before and was supposed to have been forgotten. Barton replied, according to Siegel, "Okay, you have an attitude problem." Siegel asked if Barton thought she was "an instigator" and Barton replied, "Well, are you?" Thereupon, she was escorted to her car by the security guard.

That evening Siegel phoned her supervisor, Doug Bromley, and inquired about the real reason for her discharge. Bromley repeatedly said he could not talk about the matter.

Siegel affirmed that from time to time Supervisor Bromley would advise her that her rejection rate was too high, and that the product she was inspecting should be inspected in accordance with commercial rather than military quality control specifications. According to Siegel, the type of inspection, whether commercial or military, would vary from day to day, and Siegel would continue applying one type of specification until advised to the contrary by Bromley. Siegel testified that Barton made no mention of any alleged misapplication of the correct inspection standard during the discharge interview.

Karen Summers became employed by Surgitronics on September 25, 1979. She was a quality control inspector. Doug Bromley was her supervisor. She attended the July 20 and 21 union meetings. On the morning of July 21, she went to the cafeteria and attempted to get employees to sign authorization cards.

On July 22, at or about 9:45 a.m., Supervisor Jim Glidewell called 14 quality control employees to a meeting. Ray Albrecht, employee relations manager,[6] and Myron Ligon, personnel director, were also present. Glidewell announced that the meeting had been called because Mary Siegel had been terminated due to a disagreement with management. Summers asked the nature of the disagreement and Glidewell reiterated that "it was just a disagreement." Summers asked if it had anything to do with the Union. Glidewell said no, and added that

[3] Employee Reynolds corroborated Daniels' testimony in this regard.

[4] About 6 weeks prior to July 22, a quality control inspector, employee Shirley Fry, had without explanation walked off the job. Contrary to Respondent's rules, Fry was not discharged for such an infraction of policy, but rather was allowed to return to work the following day. Employees Mary Siegel, Sue Daniels, and Dana Schultz, all quality control inspectors, protested this favorable treatment of Fry and tendered their resignations. In addition, although the record is not entirely clear on this point, it appears that Cyberlith department employees remained in their work area but refused to work for 3 hours that day as a result of this incident. Later that day, Ray Albrecht, employee relations manager, advised the three aforementioned employees that Fry had been terminated, and requested that the women rescind their resignations, stating that the women could remain as employees and the matter would never be brought up again. Thereupon, Siegel and Daniels did rescind their resignations, but apparently Schultz did not.

[5] Barton was again referring to the Shirley Fry incident in which both Siegel and Daniels were involved, *supra*, fn. 4.

[6] Albrecht quit in August 1980.

Siegel and management simply did not see eye to eye. Summers pursued the matter and asked whether Albrecht or Ligon could give her a better answer. Again Summers was advised that Siegel had been terminated due to a disagreement with management.

Immediately following the meeting, Ligon approached Summers and told her to accompany him to Barton's office if she wanted to know more about Siegel's termination. Summers did so and waited outside Barton's office for about 5 minutes while Ligon and Albrecht were in conference with Barton. Upon being admitted to the office, Barton asked Summers what the problem was. Summers stated she was told she could ask why Siegel was fired, adding that Siegel was her friend. Barton asked whether Summers knew that Siegel had previously tendered her 2-week resignation notice. Summers acknowledged that she did know this, adding that she was also aware that Siegel had rescinded her resignation. Barton then stated that Siegel's discharge was none of her business and asked whether Summers liked her job. She said yes. Barton then stated that she, too, could be terminated. Summers looked at him incredulously. Barton said "That's right," and told Security Guard Tumbelson, who had been in the room during the conversation, to obtain Summer's badge and escort her to her car, stating that he did not want her to go back through the building to get her personal belongings.

Geraldine Reynolds worked for Surgitronics in the subassembly department. She attended the July 20 union meeting and solicited union cards before work the next day, putting the cards in her purse. At lunchtime she obtained a number of authorization cards from Sue Daniels, as described above, and observed that two security guards were watching the group of employees outside the plant. Upon getting into her car for the purpose of delivering the authorization cards to the union representative, she noticed that Supervisor Tony Monte had gotten into a white security car with "Intermedics Security" printed on the door. Observing that Monte was following her on her way to the Union's headquarters, she pulled into a restaurant parking lot and waited. Monte, who had followed her into the lot, left after about 5 minutes. Reynolds then proceeded to deliver the some 30 authorization cards to the Union's headquarters, with an accompanying note to the business representative stating that the Company was aware of the union meeting Sunday and that "all hell has broken loose."

Employee Debbie Goudy, who began working for Surgitronics on October 28, 1978, testified that she had attended the July 20 and 21 union meetings and that prior to the commencement of work on July 21 she solicited one authorization card. On July 21, her supervisor, Duane Taylor, conducted a meeting of the 35 employees in the disposable products department. Taylor said, according to Goudy, that if the Company were to go union the employees would lose all their benefits and that they would not be able to talk to him about personal problems but rather would have to bring these matters to his attention through the union steward. He further stated that the employees could get their cards back if they wanted to.

On July 31, Taylor asked Goudy if the Union were holding the election. Goudy replied that she did not know the Union had gotten that far.

On the next day, Friday, August 1, Taylor instructed Goudy to count certain inventory, stating that he would have all the other employees assist in taking inventory of the remaining items. After lunch that day, Mya Stetzman, a group leader, instructed Goudy to count certain additional items on the shelves. Goudy asked if Stetzman had asked Taylor about this, and Stetzman said that she had. Nevertheless, Goudy replied that she was not going to perform such work until Taylor instructed her to count the additional items, advising Stetzman that Taylor had previously stated that all the other employees were going to help. About a half hour later, Taylor did so instruct Goudy. Goudy asked him to help her get the boxes off the top shelves as she could not reach them. As she was carrying a box of parts, the box dropped on the floor and she picked them up. The parts were not damaged and nothing was said to her by Taylor, who was present at the time. She continued to perform the required work until 2:30 p.m. when she left work upon receiving a call from the Respondent's day care center that her little boy was sick.

On Monday morning, August 4, Taylor directed some 30 employees, including Goudy, who were not then involved in taking inventory, to wait in the lunchroom until they were called, apparently by some other supervisor, to assist in another area. While Goudy was waiting in the lunchroom, Supervisor Monte entered, stood at the head of one of the tables, and asked if anyoody knew how to count. Goudy replied that she usually used the electric counter and did not count by hand. Monte then left.

Goudy had been waiting in the lunchroom from 7:30 to 11:20 a.m., at which time Taylor sent Goudy and another employee to another line. About 5 minutes later Taylor summoned Goudy into an office and asked what "the hell she was doing pulling a temper tantrum." Goudy asked what he meant by a temper tantrum and Taylor replied, according to Goudy, "What about the one this morning" Goudy suggested that Taylor call Stetzman into the office. Stetzman was called to the office and confirmed that Goudy had refused to do certain work.[7] Taylor said, "Well, it's outside of my hands, anyway. I already talked to Myron Ligon, and he's authorized me to fire you." Then she was escorted to the door.

On the morning of August 28, Supervisor Jim Glidewell conducted a meeting attended by about five quality control employees, including Zenda Zak. Zak testified that during the course of the meeting, Glidewell said he had an open-door policy and invited the employees to come in and talk to him about problems whenever they desired to do so. Immediately thereafter, Glidewell summoned Zak to his office and said it was quite obvious that she was involved in the Union. He asked what she thought the Union could give her that the Company

[7] Whether Stetzman was referring to Goudy's refusal to follow her instruction the preceding Friday, or Goudy's reluctance to assist Supervisor Monte that Monday morning, is not clear from the record.

could not, and wanted to know if she had any complaints about benefits. Zak stated that she had no complaints about benefits, but voiced several other complaints. Glidewell reiterated that he had an open-door policy, and that the employees should feel free to come in and talk to him. He also said that he wanted to know what the employees were thinking, and wanted to know "if anything was going on."

3. The July 25 layoff at Surgitronics

At or about 3 p.m. on July 21, a group meeting of all Surgitronics employees was held. Steven Barton, president of Surgitronics, handed out yearly pins to certain employees and announced the employee of the month. Barton went on to state, according to employee Sue Daniels, that production was great, that the employees were doing a fine job, and that there was plenty of work. He also said that the Cyberlith area had done such a great job with the Xerox boards, a product manufactured by Respondent for the Xerox Corporation, that Xerox had awarded the contract to Surgitronics, and again reiterated that there would be plenty of work for everybody. Barton further mentioned, according to Daniels, that Respondent had purchased a company in Minnesota, and intended to begin producing certain new products formerly manufacturing by it, and stated that "we would all have plenty of work, more modern work, and a lot better work."

Barton then turned the meeting over to Tom Anderson, director of manufacturing, who announced a "pleasant surprise" for the employees. Anderson then stated that the point system, which had been utilized as a means to reduce absenteeism, was going to be modified to the employees' advantage. Thereafter, the meeting was opened to questions and comments, and various employees from the subassembly and Cyberlith departments voiced complaints and pointed out various concerns.

Cecilia Moody, another Cyberlith department employee, confirmed Daniels' foregoing account of the meeting, testifying that Barton stated that business was great, that sales were up, that a new plant had been acquired, that Surgitronics had a Xerox contract, and that the Cyberlith department was doing fantastic. Employee Kenneth Miller testified that during this meeting, Barton stated that there was going to be plenty of work.

Barton testified that communications meetings, attended by all employees, are conducted about once a month and that there was such a meeting on the morning of July 21. On direct examination by Respondent, Barton testified that the upcoming contract for Xerox "that was a period of time away" was discussed; that he complimented the employees on the quality of their work which was very good; and mentioned that he and Chambers were then involved in negotiations concerning the potential acquisition of a company called Medgeneral[8] in Minneapolis, and described some of Medgeneral's products which would possibly be produced by Respondent. On cross-examination, however, Barton acknowledged telling the employees that Respondent had received an order from the Xerox Corporation in California for some commercial electronic boards, and had also received a small order from Xerox in Dallas; that Respondent's customers were pleased with various products produced by Surgitronics and were increasing the amount of their orders; that for the remainder of the month the production schedule was "very rough" and "it would require everybody's best effort in order to get the orders out the door"; and, in conclusion, Barton acknowledged that he asked for a big effort from the employees and exhorted them to reduce their absenteeism as much as possible.

On the morning of July 25, the 15 employees who worked in the subassembly department were summoned into Barton's office about 9:30 a.m. Russell Chambers and Steve Barton were present. Barton stated that it was a sad day for Surgitronics. He announced a permanent layoff, explaining that for various reasons Respondent was closing down both the Cyberlith and subassembly departments. Barton further told the employees that it would take 3 to 6 months before a new Cyberlith programer would be ready for production. A similar meeting was held that morning with some 15 or 20 Cyberlith department employees. As a result of the two meetings, approximately 34 employees were terminated and received their paychecks that day. Thereafter, they each received a separate check constituting their termination pay.

Chambers testified that there were three principal reasons which prompted Respondent's decision, tentatively made in May, to cease production of the Cyberlith programer. First, Chambers had received calls in May, and perhaps prior to May, from sales representatives complaining about technical problems, apparently involving the battery life of the programer, that doctors were experiencing. Respondent had previously been aware of these problems.[9] Secondly, on May 30, the Respondent had submitted a written request to the Food and Drug Administration for permission to produce a replacement programer which had previously been designed. Respondent, anticipating speedy approval, expected to begin production of the new programer and discontinue the production of the old programer as soon as FDA approval was received. The approval, expected to be within 60 days following the May 30 submission, was not forthcoming. Instead, on July 8, the FDA notified Respondent that substantial additional information was needed before the FDA could approve the product for production and marketing.[10] Finally, according to Chambers, it was felt, also apparently in May, that the market was saturated, and that there were quite a few programers in inventory which would satisfy the reduced demand until the new programer could be marketed. Chambers was also concerned about Surgitronics' operating deficit of $500,000. Chambers testified that as a

[8] This company was not acquired until December 28, and Respondent had not commenced manufacturing any new products as a result of this acquisition as of the date of the hearing herein.

[9] According to Barton, Respondent had known about the problem for 6 or 8 months prior to the layoff, and the engineers at Intermedics had been investigating alternative power sources. At the time of the hearing, this problem was still being evaluated.

[10] Such authorization was not received from the FDA until the first part of January 1981.

result of the foregoing, it was decided to discontinue production of the old programer. Thereupon, the layoff was effectuated.[11]

Barton's testimony regarding Respondents' reasons for the layoff did not differ materially from the reasons enunciated by Chambers. Although Barton stated that the last time he and Chambers discussed the matter was the morning of July 23, and recounted this July 23 conversation during the course of his testimony, he did not provide the substance of any prior conversation he may have had with Chambers. Barton also further testified that the final decision to effectuate the layoff was made at or about 4 p.m. on July 23, upon being advised by Personnel Director Ligon that there were no openings for Surgitronics employees at the Intermedics facility.

Employer Kenneth Miller, who worked as an electronic technician in the Cyberlith department, testified that on the morning of the layoff an employee asked Miller how many Cyberlith programers were scheduled to be produced for the remainder of the month. Miller, in turn, asked Supervisor Bill Tabor, who advised Miller that the department had produced 98 programers to date that month, and that the quota for the month had been set at 150. According to Miller, the Respondent had consistently produced about 150 programers per month.

Employee Zenda Zak testified that on July 28, 29, and 30, following the layoff, she observed two employees performing work (making a particular type of torque screwdriver) on the assembly line, which work subassembly department employees had previously performed.[12] Further, on August 1, Zak had a conversation with her supervisor, Jim Glidewell, as she was inspecting Xerox boards which had been produced by the Cyberlith and/or the subassembly department. Glidewell stated that the Xerox boards were the Company's "bread and butter" for the monthly billings, and that laying off the Cyberlith and subassembly lines really hurt the Company as the boards were the big money makers. According to employee Kenneth Miller, a quota of about 1,500 Xerox boards per week had been scheduled for the month of July, and during the week ending July 25, most of the Cyberlith department employees were working on the Xerox boards, rather than programers, in order to meet this monthly quota.

Mary Compton was transferred from the Intermedics facility to the Surgitronics plant on August 1. She was placed under the supervision of Tony Monte and worked on Xerox boards along with several other transferees from Intermedics. Further, Compton testified that several additional Intermedics employees were transferred to quality control at Surgitronics. Compton also testified that the subassembly department, supervised by Tony Monte, continued to function on and after August 1, and she observed that the line was staffed by 15 or 20 employees. Prior to the hearing, according to Compton, two employees who had quit approximately a year before were rehired by Surgitronics and five new employees with no prior work experience for Respondent had recently been hired.

Zenda Zak testified that the Cyberlith line started up again about the end of October. Since that time the Cyberlith department, staffed with about 15 employees, apparently all but 1 or 2 being transferees from Intermedics, has been working on an overtime basis making the old Cyberlith programer with only a few minor changes. To the date of the hearing, about 200 Cyberlith programers have been made.

Barton, explaining the need to commence the production of the old Cyberlith programer in October, testified that, in September or October, Respondent acquired a company that manufactured pacemakers. This acquisition created a greater demand for the Cyberlith pacemaker, thus necessitating the need for the production of Cyberlith programers which are used by physicians to program implanted Cyberlith pacemakers.

4. Events at the Intermedics facility

The Union first handbilled Respondent's Intermedics facility on August 13. Bob Smith, field representative, testified that as he was handbilling at a side entrance along with employee Mary Siegel, a guard walked over to him and remained standing in very close proximity to him, observing and waving employees' automobiles in through the gate in order to prevent the employees from accepting any literature. Another security guard hollered to the first guard, "Don't let those cars stop. Wave them on in." This action on the part of the security guards, according to Smith, effectively inhibited the Union's ability to distribute handbills to the employees.

Within 15 minutes, a Freeport police officer drove through the parking lot entrance, stopped his car near the building, and spoke to a security guard supervisor.[13] The police officer then approached Smith and told him that Intermedics did not want him there and wanted him removed. He further warned Smith that, if the Union's handbilling caused one car to stop in the street, the individuals distributing the handbills would be arrested. Smith, who is also a municipal court judge, told the police officer that the Union had a right to handbill. According to Smith, Respondent's security guards would wave cars in through the gate on each subsequent occasion when the Union commenced to handbill. Smith further testified that at no time did the handbilling cause any cars to stop in the street.

E. G. Fuqua, business manager of the Union, similarly testified that a security guard came out and stood by him the entire time he was handbilling at a different gate. As the cars would approach, the guard would wave them through. Fuqua made certain that at no time was traffic slowed up, as he had been advised by the police that if cars were caused to stop in the street he would be arrested. Moreover, Fuqua testified that on the various occasions he would begin to handbill, a TV camera, mounted on a pole near the gate he was handbilling, would cease its panning motion and would become fixed on him and

[11] Respondent had produced a total of about 2,000 Cyberlith programers at the time that production was discontinued on July 25.

[12] The record shows that subassembly department employees had customarily produced numerous products in addition to those used only in conjunction with the Cyberlith programer.

[13] The security guard standing near Smith advised Smith that the police officer was speaking to the guard's "boss."

on employees who where also engaged in handbilling. Further, on August 20, as Fuqua was handbilling, he observed that one of the guards who was patrolling the entrance to Respondent's building gathered the handbills from the employees as they entered the building.

Employee Steven Shoemate testified that in late August, he accepted a union leaflet from an individual upon entering the gate. When he arrived at the security entrance, a guard said that Shoemate was going to have to give him the leaflet as such literature was not allowed either on company property or in the plant. However, Shoemate refused to turn over the literature to the guard. Also in late August, Shoemate's supervisor, Elmer Fischer, asked him to remove a green union bumper sticker from his toolbox because Fischer "didn't want to receive a lot of harassment and static and pressure from the higher-ups." Shoemate complied with this instruction.

Shoemate further testified that at a meeting of all Intermedics employees, held on August 7, Chambers said that there was a company rule prohibiting union literature on company property and in the plant, and told the employees that he did not want the union people on company property disrupting business.

Judith Callaway testified that in August, on a day when the Union was distributing handbills outside the plant, she observed that three or four security guards were jerking the leaflets out of the employees' hands as they were entering various entrances of the plant. Callaway also testified that various products such as toys, jewelry, Avon, and Amway items were sold by employees on company property during breaks. Also, football pools were prevalent.

5. The no-solicitation and distribution rule

The parties stipulated that prior to November 1980 an employee handbook entitled "The Future Looks Good" was handed out to new employees. The handbook contained the following rules, applicable to the employees at both the Surgitronics and Intermedics facilities:

> XIII. COMPANY RULE AND REGULATIONS
>
> The following constitute major infractions of Company Rules and Codes of Conduct. While this list is not all inclusive, committing one or more of these serious offenses may result in dismissal.
>
> * * * * *
>
> 15. Possession of objectionable printed matter or photographs.
>
> 16. Soliciting or distribution of literature on Company property.
>
> * * * * *
>
> XXVI. NO SOLICITATION RULE
>
> It is the rule of the Company that unauthorized solicitation of employees or customers upon the premises or in the area of the plant or office by or on behalf of any club, society, labor union, religious organization, political party or similar association is strictly prohibited. This prohibition applies both to employees on working time and to outsiders, and it covers soliciting in any form, whether for membership for subscription, or for payment of money.

6. Election objections

According to the uncontradicted testimony of Beatrice Carroll, observer for the Union during the course of the morning election session at Intermedics on October 10, Russell Chambers, president and chief executive officer and director of Respondent, entered the voting area, looked around, and uttered some statements, the nature of which Carroll apparently did not hear, at a time when some 30 employees were standing in line waiting to vote. The Board agent conducting the election, according to Carroll, had to instruct Chambers to leave the area twice before Chambers complied.

Later that morning, Chambers walked into the hallway area outside the voting room, where some 40–50 employees were queued waiting to vote. According to employee Judy Calloway,[14] Chambers broke through the line, stopped, and frowned while staring at the employees in line, and then departed.

Some 35 employees, comprising those Cyberlith and subassembly department employees who had been laid off on July 25, and other alleged discriminatees who had been discharged earlier that week, had assembled at the Surgitronics facility on October 10, at or about 7:35 a.m., for the purpose of voting during the morning session. They were not permitted in the building when the polls opened. Rather they were ordered to the rear of the building, where they were met by a security guard, and were required to wait in a mosquito-infested area for nearly an hour before they were permitted to vote. Upon being advised that these employees were thus being prevented from voting, the Board agent conducting the election announced over the loudspeaker, three different times, that any remaining voters should cast their ballots. After the third announcement, the employees were allowed to vote.

At the preelection conference, according to Union Business Representative Smith, the attorney for Respondent contended that the aforementioned employees should come in early and vote as a group, or wait until everyone had voted, taking the position, in effect, that no other employees should see them. While Smith said there was no resolution of the matter, he understood that when the employees presented themselves at the polls they would be permitted to vote.

C. *Analysis and Conclusions*

1. The 8(a)(1) violations

The credible and unrebutted testimony of various employees, including Sue Daniels, Kenneth Miller, Cecilia Moody, Mary Siegel, and Geraldine Reynolds, abundantly establishes that Respondent was well aware of the

[14] Calloway had heard "through the grapevine" that Chambers had appeared in the voting area earlier that morning.

nature and extent of its employees' union activity on July 21 and thereafter at the Surgitronics facility. Such activity was not clandestine, but rather was engaged in openly and extensively in full view of supervision.

Moreover, the unrebutted record evidence shows that such organizational activity prompted Respondent to engage in extensive surveillance of employees' union activity. Surveillance by Respondent's supervisors and security guards[15] was blatant and widespread, and included attempts to search employees' purses, spying on employees during their breaks,[16] closely watching employees while they were working, conspicuously observing employees as they would enter the gates of the Intermedics facility by stationing guards at such locations and by monitoring the activity by means of a TV camera, and by following employee Geraldine Reynolds as she attempted to deliver authorization cards to the union representative during her lunch break.[17]

In the absence of contrary testimony by Respondent's supervisors who were explicitly identified as having engaged in surveillance of employees for prolonged periods of time and in a manner which was inconsistent with their customary daily routines, I find no merit to Respondent's contentions that the employees who testified herein regarding said surveillance were simply paranoid or overly sensitive, and that the conduct of Respondent's supervisors was not out of the ordinary. Rather, I credit those employees named above and find that Respondent's supervisors commenced to engage in atypical behavior, characterized by intensive and highly conspicuous surveillance of employees' activity immediately upon learning of the organizational campaign. Surveillance of this nature clearly has an inhibiting effect upon employees' union activity and is violative of Section 8(a)(1) of the Act. See *K-Mart Corporation*, 255 NLRB 922, 922–925 (1981); *Stoughton Trailers, Inc.*, 234 NLRB 1203, 1205–07 (1978); *Lyman Steel Company*, 249 NLRB 296, 302–303 (1980).

The record is clear that, during the handbilling at the Intermedics facility on and after August 13, those organizers and employees distributing handbills at the gates and those employees receiving handbills were conspicuously observed by security guards and by a TV camera trained on such activity. Moreover, the conduct of the guards in waving employees' cars through the entrances effectively precluded many employees from obtaining such literature. Absent legitimate justification for such surveillance of clearly permissible union organizational activity which, I find, in crediting the testimony of Smith and Fuqua, caused neither interference with employees ingress into Respondent's parking lot, nor traffic congestion in the adjacent street, nor any other disruption of Respondent's operations which would reasonably have provided it with legitimate concern, the Respondent's actions were unwarranted and constituted unlawful surveillance having the clearly inhibiting effect of precluding lawful union activity.[18] I find, in agreement with the General Counsel, that by such conduct Respondent has violated Section 8(a)(1) of the Act.[19] See *United States Steel Corporation*, 255 NLRB 1338 (1981); *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 246 NLRB 299, 301–302 (1979); *J. P. Stevens & Co., Inc.*, 244 NLRB 408 (1979); *C. E. Wilkinson & Sons, Inc.*, 255 NLRB 1367, 1376 (1981).

Respondent, admitting that security guards confiscated handbills from employees as they were entering the plant, maintains that this was the result of a misunderstanding of management's instruction to simply obtain one such handbill. Contrary to Respondent's position, I find that such an alleged misunderstanding does not excuse its conduct. Thus, employees were never thereafter advised that the handbills has been confiscated by mistake, nor were they told that Respondent would permit employees to bring such literature into the plant. Moreover, the confiscation of such literature was consistent with Respondent's unlawful no-distribution rule, *infra*. I therefore find that, by confiscating such handbills, Respondent violated the Act, as alleged. See *Photo-Sonics, Inc.*, 254 NLRB 567 (1981); *Elias Brother Big Boy, Inc.*, 137 NLRB 1057, 1075 (1962), enfd. 325 F.2d 360 (6th Cir. 1963).

It is uncontroverted that on July 21, Supervisor Duane Taylor told a group of 35 employees that if the company was to go union the employees would loose all their benefits, that they would no longer be able to talk to him directly about their personal problems, and that they could get their union cards back if they wanted to. Such statements regarding the loss of benefits are violative of the Act. *Jamaica Towing, Inc.*, 236 NLRB 1700 (1978), enfd. in part 632 F.2d 208 (2d Cir. 1980); *Han-Dee Pak, Inc.*, 232 NLRB 454, 458–459 (1977). Moreover, I find that in the context of Taylor's unlawful warnings of loss of benefits, his suggestion that employees could request

[15] The conduct and statements of security guards is clearly attributable to Respondent. See *M. N. Landall Stores, Inc., d/b/a Clark's Discount Department Store*, 168 NLRB 273, 288 (1967), enfd. in pertinent part 407 F.2d 199 (6th Cir. 1969); *National Paper Company*, 102 NLRB 1569, 1571–72 (1954), enforcement denied 216 F.2d 859, 868 (5th Cir. 1954).

[16] Indeed, one security guard warned employee Daniels that she was being watched.

[17] I credit employee Reynolds and find that she was not fabricating this incident, and that she was indeed followed by Supervisor Tony Monte after she was observed by security guards receiving authorization cards for transmittal to the Union. While the Respondent presented evidence that Monte did not have access to the particular Intermedics security vehicle described by Reynolds, I nevertheless conclude that Monte engaged in the conduct attributed to him by Reynolds, as Reynolds appeared to be a forthright witness with a vivid recollection of the occurrence, and particularly as Monte was not called on to deny Reynolds' testimony. I find that by such conduct Respondent violated Sec. 8(a)(1) of the Act, as alleged.

[18] Respondent's records reflect that on August 20 two separate incident reports were prepared by security guards, reflecting that the handbilling on that particular morning result in some traffic congestion between 6:45 and 6:55 a.m. The guards who authored such reports were not called as witnesses. Assuming *arguendo* that the handbilling did cause traffic congestion for a brief period of time, Respondent's unlawful surveillance commenced a week prior to this incident.

[19] While the record evidence shows that Respondent did not summon the police in the first instance, I find that statements by police officers that individuals who engaged in handbilling would be arrested if they obstructed traffic, and that Intermedics did not want the handbilling to continue, is attributable to Respondent. I base this finding on Smith's uncontradicted testimony that he observed one of the security guards and the police officer engaged in a conversation immediately prior to the police officer's warning. I find that, in effect, Respondent was attempting to use the police officer for its unlawful devices. Under such circumstances, I find that the police officer's threats are attributable to Respondent, and that by such conduct Respondent has violated the Act.

the return of their union cards was coercive, and similarly violated Section 8(a)(1) of the Act.

Also violative of the Act are Supervisor Glidewell's various August 28 statements to Zenda Zak. During this conversation Glidewell told Zak, according to her unrebutted testimony, that he was well aware of her involvement in the Union and inquired about her reasons for supporting the Union. He advised her of his open-door policy, solicited her complaints, and encouraged her to advise him "if anything was going on." Absent any contrary evidence, it is reasonable to presume, under the circumstances, that Glidewell was requesting Zak to provide information regarding employees' union activity. Such coercive interrogation, implied promises of benefits, and solicitation of complaints and of information regarding employees' union activities, are clearly violative of Section 8(a)(1) of the Act. I so find.

Finally, Supervisor Fischer's directive to Shoemate to remove the union sticker from his toolbox because he "didn't want to receive a lot of harassment and static and pressure from higher-ups" is violative of the Act. Absent special circumstances not apparent herein, such conduct inhibits permissible union activity. See *Dixie Machine Rebuilders, Inc.*, 248 NLRB 881, 882 (1980); *United Parcel Service, Inc.*, 234 NLRB 223 (1978).

The complaint alleges that Respondent's no-solicitation and no-distribution rules are unlawful. Paragraph XIII of Respondent's employee handbook contains clearly unlawful language, *supra*, which prohibits solicitation and the distribution of literature on company property. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962); *Lebanon Apparel Corporation*, 243 NLRB 1024 (1979); *Essex International, Inc.*, 211 NLRB 749 (1974).

Paragraph XXVI of the same handbook contains another rule regarding solicitation only, which prohibits solicitation at any time by "outsiders" in various areas including "the area of the plant or office," but only prohibits solicitation by employees on their working time.

Respondent concedes that the no-distribution rules are invalid, but argues that the no-solicitation rule embodied in paragraph XXVI of the employees' handbook is valid insofar as its application to employees on their working time. Moreover, Respondent maintains that no finding of a violation is warranted as the rules embodied in the employee handbook were not enforced. In support of this argument the Respondent acknowledges that it permitted its employees and supervisors to engage in various forms of solicitation for religious organizations, Avon, Amway, and Tupperware products, and football pools, and that Respondent permitted open solicitation for the Union in the lunchroom in the presence of supervisors.

In agreement with the General Counsel, I find that both the Respondent's no-distribution and no-solicitation rules are invalid. To the extent that the no-solicitation rule enunciated in paragraph XXVI of the employee handbook is inconsistent with the rule reflected in paragraph XIII, such conflicting rules create an ambiguity which would reasonably tend to inhibit permissible solicitation by employees who would be uncertain of which rule Respondent intended to enforce. Moreover, Respondent's contention that the rules were not, in fact, enforced, does not operate as a defense, as the mere existence of an invalid rule interferes with [illegible] rights under the Act. *Southern Moldings, Inc.* [illegible] 839, 850–851 (1981); *Custom Trim Products* [illegible] 787, 788 (1981) *Lennox Hill Hospital*, [illegible] 1242 (1976).

Finally, the record clearly shows that [illegible] unlawful no-distribution rule was indeed enforced. I find that Respondent's blatant attempts to prevent union representatives and employees from distributing handbills to employees at the gates, and the confiscation of handbills by the security guards, constituted enforcement of the unlawful no-distribution rule. Moreover, Respondent's president, Russell Chambers, announced to Intermedics' employees on August 7, prior to the new billing at that facility, that there was a company rule prohibiting union literature on company property [illegible] the plant. It is therefore clear that Respondent [illegible] to, and did in fact, enforce the unlawful no-distribution rule, and I find Respondent's contention in this regard to be without merit.

2. The discharges

Sue Daniels was admittedly considered to be an outstanding employee, and Barton admitted that Daniels' supervisor, Billy Tabor, was not in favor of terminating her. There can be no doubt, and I find, that Respondent was aware that Daniels was actively, persistently, and successfully soliciting for the Union on July 21 and 22. Indeed, Daniels was warned by Security Guard [illegible] that her activity was being watched.

On July 22 Daniels was summarily dismissed by Barton. Although Barton testified that the discharge was prompted by information relayed from Personnel Director Ligon[20] to Barton that Daniels had left her work area and told another employee that she was going to be fired,[21] Barton further testified that during the discharge conversation he told Daniels she was being dismissed for "refusal to follow orders." Significantly Barton did not testify that Daniels' discharge was prompted by the Shirley Fry incident, *supra*. However, Barton's affidavit stipulates that the sole reason for the discharge of Daniels was the Shirley Fry incident and makes no mention of the Cheryl Woodward matter.

I credit Daniels' account of the discharge conversation, and find that Barton told Daniels she was being discharged because Respondent felt she was not happy with her job. Based on the foregoing, including the timing and precipitate manner of the discharge, Respondent's shifting reasons for Daniels' discharge, its failure to support such reasons with any convincing evidence, and its failure to confront Daniels', an admittedly outstanding employee with a long employment history with such reasons in order or obtain her explanation of the matters which allegedly were of concern to [illegible]

[20] Ligon did not testify regarding this matter.

[21] Barton explained that at the communications meeting on [illegible] employee Cheryl Woodward asked Barton if she were going to be [illegible] Barton questioned her regarding what gave her the impression that she was to be terminated, and she provided Barton with no basis for the question. He then told her to speak to her supervisor to see if there was a problem.

spondent, it is abundantly clear that Daniels was discharged solely because of her union activity in violation of Section 8(a)(3) of the Act. I so find.

Mary Siegel was similarly active in openly soliciting employees to sign authorization cards at the Surgitronics facility on June 21 and 22, and I find that Respondent was also aware of her activity in this regard. Barton testified that Siegel's July 22 discharge was prompted by her being "counseled repeatedly" by various supervisors, including Bromley and Glidewell, regarding her excessive rejection of work which was caused by applying an incorrect inspection standard. According to Barton, Siegel was advised during the discharge conversation that she was being terminated for refusal to follow orders.

There is no convincing record evidence that Siegel was "counseled" about her work. Neither Bromley nor Glidewell was called on to substantiate Barton's testimony, nor did Respondent introduce any written documents which would support Barton's assertions in this regard. While Siegel acknowledged that Supervisor Bromley would sometimes have occasion to tell her that her rejection rate was too high, such conversation would customarily occur when, without her being advised, Respondent would change from military to commercial inspection standards. The record indicates that such conversations were not in the nature of reprimands to Siegel, but rather were merely routine communications in an effort to ensure that the correct inspection standards were utilized. Thus, according to Siegel's unrebutted testimony, the type of inspection, military or commercial, would vary from day to day, and Siegel had been instructed to continue applying one type of specification until advised to the contrary by Bromley. Moreover, Siegel credibly testified, again without contrary evidence proffered by Respondent, that the most recent conversation with Supervisor Bromley regarding the application of inspection standards occurred some 3 or 4 months prior to her discharge.

I credit Siegel's testimony, and find that during the discharge interview not only did Barton make no mention of her alleged failure to follow orders as the reason for her discharge, but rather Barton unequivocally stated that Siegel was being discharged as a result of the Shirley Fry incident which occurred some 6 weeks prior thereto, and because of an "attitude problem." Respondent's shifting, unsupported, and implausible reasons for Siegel's discharge,[22] immediately upon becoming aware of Siegel's involvement in the organizational campaign, clearly mandates the conclusion that her discharge was occasioned not for the reasons advanced by Barton, but because of her union activity. I therefore find that, as alleged, Siegel was discharged in violation of Section 8(a)(3) of the Act.

Shortly after Siegel's discharge, Barton also discharged *Karen Summers* who had also engaged in union solicitation on July 21 in the cafeteria. Summers was specifically invited to Barton's office as a result of her persistent efforts to discern why her friend Mary Siegel had been discharged. While in Barton's office she candidly expressed her disbelief of the reason Barton was then advancing for the discharge, namely, the Shirley Fry incident, and was thereupon summarily discharged even after acknowledging to Barton that she did indeed like her job.

Barton testified that shortly after discharging Siegel he was advised by Personnel Director Ligon that Summers had become extremely agitated at a meeting of the quality control department, which had been held for the purpose of explaining the discharge of Mary Siegel, and wanted to know why her friend had been terminated. Barton testified that during the ensuing conversation with Summers in his office, he explained that he really could not give her complete information on Siegel's termination because it was a private matter between the company and the dischargee, and such information was not normally disclosed. Summers persisted, however, demanding to know why Siegel was terminated and, according to Barton, refused to return to work as Barton had requested. Barton repeated several times that the matter was confidential, and finally advised her that if she did not go back to work she would also be discharged. She refused and was summarily terminated.

I credit Summers' account of the conversation. It is clear that Summers was discharged because of her expression of anger toward Respondent and sympathy toward Siegel, and her refusal to accept Barton's explanation for Siegel's termination. Summers' behavior in Barton's office was not excessive or extreme, and indeed she was invited to Barton's office to receive a more persuasive explanation which, when proffered, she promptly and effectively rebutted. Nor do I credit Barton's testimony that he repeatedly instructed her to return to work.[23] The only reasonable explanation for Barton's discharge of Summers is that Summers had demonstrated her allegiance to the union cause both as a result of her visible activity in soliciting union cards in the cafeteria, which activity was carefully watched by Respondent's supervisors, and as a result of her support of Siegel who, as one of the leading union adherents, had been unlawfully discharged earlier that day. I therefore find that Summers also discharged as a result of her activity on behalf of the Union, and that by such conduct Respondent violated Section 8(a)(3) of the Act, as alleged.

Regarding employee *Debbie Goudy*, I conclude that the record evidence is insufficient to warrant the finding that her discharge was violative of the Act. While Goudy's testimony shows that she attended a union meeting on July 20, and solicited a friend to sign a union card "on the way to work" the following morning, there is no record evidence that Respondent was aware of such union activity, or that Goudy demonstrated her affinity for the Union while at work. Nor is there evidence that Goudy was a more active union adherent than the approximately 34 other employees in her department. Moreover, on August 1, when Supervisor Taylor asked Goudy "if the union was holding their election," Goudy's answer that she "didn't know the Union had

[22] Indeed, shortly after Siegel's termination, the quality control employees were told by management that Siegel's discharge was due to "a disagreement with management" *supra*.

[23] In this regard it should be noted that Security Guard Tumbleson was not called on to support Barton's testimony.

gotten that far" was not a response that would alert Respondent to the fact that Goudy favored the Union.

Goudy's testimony, which I find was not altogether candid or complete, shows that she did refuse the direct instruction of her leadlady on August 1, and was thereafter told by Supervisor Taylor to perform the work she had refused to do. Moreover, Goudy's testimony regarding the incident on August 4 when she told Supervisor Monte that she did not count by hand, indicates another instance of insubordination, thus apparently occasioning Taylor to immediately reprimand her for a "temper tantrum" that morning.[24]

I am mindful that Respondent proffered no evidence, except for that elicited from Goudy on cross-examination, in its defense of this allegation, and that Supervisor Taylor asked Goudy an innocuous question about the union election on August 1.[25] Nevertheless, I conclude that this allegation should be dismissed for lack of a *prima facie* case. Thus, the record contains insufficient evidence of knowledge of Goudy's union activity. The circumstances and timing of her discharge did not indicate a discriminatory motive, and there is no evidence that other employees were permitted to disobey similar orders with impunity or were disciplined rather than discharged for such rule infractions which the record indicates Goudy committed.

3. The July 25 layoff at Surgitronics

The union organizational campaign commenced on Sunday, July 20. On the two succeeding weekdays, Monday and Tuesday, the zeal with which the employees at Surgitronics eagerly and openly demonstrated their favorable acceptance of the Union by signing union cards prompted immediate and unlawful retaliatory action by Respondent, including the attempt to search employees' purses, blatant and pervasive instances of surveillance, and the discharge, on July 22, of the perceived ringleaders.

The record shows that this union activity was most prevalent among the employees of the Cyberlith and subassembly departments. The approximately 35 employees in these 2 departments were summarily and permanently laid off on Friday of that week, only 4 days after being enthusiastically praised, encouraged, and escorted by Respondent's president, Barton, to put forth their best efforts in order to complete the very rough production schedule for the remainder of the month. Additionally, Barton presented the employees with a very optimistic prognosis of things to come, including increased orders which had been received, and the acquisition of a company which would result in still more work for Respondent's employees.

Respondent maintains that less than 2 days later, on the morning of July 23, it suddenly became confronted with the realization that its optimism was premature, taking the position that its precipitous about-face was mandated by problems involving profitability, defects, and an unanticipated delay in the marketing of a superior Cyberlith programer. The record is abundantly clear that each of these matters, assuming *arguendo* that they were of concern to Respondent, were matters with which the Respondent was explicitly aware long before Barton's July 21 pep talk. Thus, none of the matters advanced as reasons for the layoff came to Respondent's attention between July 21 and 23. Indeed, Chambers testified that the decision to cease production of the Cyberlith programer had been tentatively made in May.

Moreover, the Cyberlith and subassembly departments were not dependent, insofar as the record shows, upon the production of the Cyberlith programer. These departments produced numerous additional items, and there is unrebutted testimony that during the week of July 21 most of the Cyberlith department employees were attempting to fill the monthly quota of Xerox boards rather than programers.

Significantly, the record shows that the subassembly line commenced to run again on and, after August 1, and was staffed by some 15–20 employees, many of whom were transferees from Intermedics. Respondent proffered no evidence tending to contradict or explain this critically damaging evidence which renders absurd and totally incredible its possible that the layoff was necessitated by the problems involving the Cyberlith programer, above enumerated. Thereafter, in October, following the election on October 10, the Cyberlith line began to run again, and has been staffed by some 15 employees, virtually all of whom are transferees from Intermedics. During this period and continuing until shortly prior to the time of the hearing herein, the former Cyberlith and subassembly department employees were not recalled. Again, Respondent has advanced no explanation for its failure to timely recall such experienced employees.

In short, the record overwhelming supports the complaint allegation that the July 25 layoff was discriminatorily, rather than economically, motivated. To the extent that Respondent attempted to justify the layoff on the basis of the problems involving the Cyberlith programer, the record shows that these alleged concerns had been of longstanding duration, extant well before Barton's July 21 expressions not only of plentiful work but of a rough workload requiring a concerted production effort. Moreover, the record shows that since August 1, Respondent's subassembly department has operated with approximately the same number of employees, on an overtime basis. Further, the record shows that discontinuation of the production of Cyberlith programers, even if economically motivated, would not have necessitated the layoff of all the Cyberlith department employees, as most of these same employees were making other products, particularly Xerox boards, at the time of the layoff. It is highly significant that Respondent did not seek to introduce even an iota of evidence tending to show the percentage of the work of the employees in the Cyberlith and subassembly departments which related to the Cyberlith programer rather than to other products. Such evidence, assuming it supported Respondent's economic arguments, would have been of the utmost importance, and I find that Respondent's failure to proffer any evidence of this nature permits the

[24] Respondent's handbook lists "Gross insubordination (such as refusing a work assignment)" as a major infraction of company rules and codes of conduct which "may result in dismissal."

[25] In the absence of contrary testimony I credit Goudy on this point

reasonable presumption, which I make, that such evidence would be unfavorable to Respondent's position. *N.L.R.B.* v. *MFY Industries, Inc.*, 573 F.2d 673, 675 (10th Cir. 1978); *Northern States Beef, Inc.*, 234 NLRB 921, 925 (1978). On the basis of the foregoing, I find that the July 25 layoff of the Cyberlith and subassembly department employees was discriminatorily motivated, as alleged, and that by such conduct Respondent has violated Section 8(a)(3) of the Act.

4. Election objections

In addition to including in its election objections the aforementioned unfair labor practices occurring on and after July 23, the date of the filing of the petition herein, the Union has advanced two additional election objections; namely, Respondent's conduct in delaying the voting privileges at the Surgitronics facility of the employees herein found to have been discriminatorily laid off and/or discharged, and Chambers' conduct at the Intermedics facility during the course of the election.

The record stands uncontroverted that at the Intermedics facility, during the course of the election on October 10, Respondent's president entered the polling area and, in the presence of some 30 voters, had to be requested twice by the Board agent to leave the area before he complied with the request. Later Chambers, standing and frowning at the employees waiting to vote, again made his presence known to the employees.

Respondent has presented no evidence that Chambers' presence at or near the polls on the aforementioned occasions was inadvertent, necessary for valid business reasons, or based on a misunderstanding. Absent any explanation by Respondent, I agree with the Union and find that by such conduct Chambers deliberately attempted to apply whatever influence his presence may have had upon the employees' freedom to choose or refrain from choosing a collective-bargaining representative.

At the Surgitronics facility, some 35 discriminatees were restricted from the voting area for a substantial length of time. After being instructed to wait in a mosquito-infested area at the rear of the facility for a prolonged period, during which time they were kept under surveillance by a security guard, they were belatedly permitted to vote at a time determined by Respondent.

Respondent has presented no evidence which would provide a reasonable explanation or legitimate justification for such conduct, and the record is abundantly clear that Respondent merely wished to keep these employees segregated from the other voters, as Respondent's attorney made very clear at the preelection conference.

By such conduct, which I find was intentional and unjustifiable, Respondent has clearly compromised the "laboratory" conditions obtaining during Board-conducted elections, the most significant conditions being that employees shall have an absolute right to express their choice for or against union representation and that his franchise shall be, as nearly as possible, exercised in an atmosphere free from the sufferance of the employer. See *Moody Nursing Home, Inc.*, 251 NLRB 147, 148 (1980), *Colonial Lincoln Mercury Sales, Inc.*, 197 NLRB 54, 67-68 (1972), but see also fn. 1 wherein the Board finds it unnecessary to pass on the issue; *Ace Letter Service Co.*, 187 NLRB 581 (1980). However, in view of the flagrant unfair labor practices found herein which, I find, also constitute meritorious election objections, I deem it unnecessary to determine whether Respondent's conduct during the election is sufficient, standing alone, to warrant setting aside the election.

The Respondent's unfair labor practices committed following the filing of the representation petition herein on July 23, and included as election objections by the Union, coupled with Respondent's objectionable conduct during the election on October 10, is sufficient to establish that Respondent has interfered with the employees' freedom of choice, and I shall recommend that the election held on October 10 in Case 23-RC-4913 be set aside and that a second election be directed.

CONCLUSIONS OF LAW

1. Respondents are employees engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have violated Section 8(a)(1) of the Act by engaging in surveillance of employees, union activity, by interfering with lawful handbilling of employees, by threatening employees with loss of benefits and requesting that they request the return of their union cards, by coercively interrogating employees, impliedly promising them benefits, and soliciting information regarding employees' union activity, by requiring employees to remove union insignia, and by maintaining and enforcing unlawful no-distribution and no-solicitation rules.

4. Respondents have violated Section 8(a)(3) and (1) of the Act by discharging employees Sue Daniels, Mary Siegel, and Karen Summers on July 22, 1980, and by laying off and/or discharging the Cyberlith and subassembly department employees on July 25, 1980.

5. By the various unfair labor practices found above, specifically those occurring following the filing of the petition herein on July 23, and by engaging in objectionable conduct during the election process on October 10, 1980, Respondents have interfered with the freedom of choice of employees and it is recommended that the election in Case 23-RC-4913 held on October 10, 1980, be set aside and that a second election be directed.

6. Except as found above, Respondent has not engaged in other unfair labor practices.

THE REMEDY

Having found that the Respondents violated and are violating Section 8(a)(1) and (3) of the Act, I recommend that they be required to cease and desist therefrom and in any other manner interfering with, restraining, or coercing their employees in the exercise of their rights under Section 7 of the Act. Moreover, Respondents shall be required to post an appropriate notice attached hereto as an appendix.

Having found that Respondents unlawfully discharged employees Sue Daniels, Mary Siegel, and Karen Summers on July 22, 1980, and the employees of the Cyberlith and subassembly departments on July 25, 1980, Re-

spondents shall be required to make whole the said employees for any loss of pay as a result of the discrimination against them, and reinstate them to their former positions of employment without prejudice to their seniority or other rights and privileges, discharging if necessary any replacements. Said backpay is to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1980), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 119 NLRB 716 (1962).

Moreover, Respondent shall be required to rescind its unlawful no-distribution and no-solicitation rules.

Based upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[26]

The Respondents, Intermedics, Inc. and Surgitronics Corporation, a wholly owned subsidiary of Intermedics, Inc., Clute and Freeport, Texas, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of employees' union activity, interfering with lawful handbilling of employees, threatening employees with loss of benefits and requesting that they request the return of their union cards, coercively interrogating employees, impliedly promising them benefits, and soliciting information regarding employees' union activity, requiring employees to remove union insignia, and maintaining and enforcing unlawful no-distribution and no-solicitation rules.

(b) Unlawfully discharging, laying off, or otherwise discriminating against employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them under Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to employees Sue Daniels, Mary Siegel, Karen Summers, and to those employees of the Cyberlith and subassembly departments laid off and/or discharged on July 25, 1980, immediate and full reinstatement to their former positions or, if such positions no longer exists, to substantially equivalent positions, discharging, if necessary, any replacements, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay or other benefits suffered by reason of the discrimination against them in the manner described above in the section entitled "The Remedy."

(b) Rescind the unlawful no-distribution and no-solicitation rules.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at Respondents' facilities at Clute and Freeport, Texas, copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that certain of the Union's objections to the election held by the Board in Case 23-RC-4913 be sustained, and that the results of said election be set aside, and that said case be remanded to the Regional Director for Region 23 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining repreaentative.

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[27] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post this notice and to obey its provisions.

The National Labor Relations Act gives employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through representatives of their own choice
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities.

WE WILL NOT engage in surveillance of your activity on behalf of International Union of Operating Engineers, Local 564, AFL-CIO, or any other labor organization, either during worktime or breaktime, in the building or parking lot areas of our facilities, or away from the premises.

WE WILL NOT interfere with the distribution of union literature by stationing security guards at the plant or parking lot entrances, by monitoring such activity by means of TV cameras, by confiscating union literature, or by requiring the removal of union insignia.

WE WILL NOT maintain and enforce unlawful no-distribution and no-solicitation rules, and we will rescind such rules now in existence.

WE WILL NOT interrogate you concerning your union activity, or promise benefits to you or threaten you with loss of benefits in order to cause you to withdraw your support from the Union, or induce you to request the return of your union cards.

WE WILL NOT solicit information from you about employees' union activities.

WE WILL NOT discharge or layoff employees for supporting or otherwise engaging in union activity on behalf of International Union of Operating Engineers, Local 564, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL offer Sue Daniels, Mary Siegel, Karen Summers, and all Cyberlith and subassembly department employees laid off or discharged on July 25, 1980, immediate and full reinstatement to their former positions or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging if necessary any replacements.

WE WILL make the said employees whole, with interest, for any loss of earnings they may have suffered as a result of our discrimination against them.

The election held on October 10, 1980, by the National Labor Relations Board has been set aside and its results voided because of our unlawful conduct affecting the outcome of that election, as found by the Board, during the period preceding that election. In due time, another election will be held, and you will be notified of the date, time, and place.

INTERMEDICS, INC. AND SURGITRONICS, CORPORATION, A WHOLLY OWNED SUBSIDIARY OF INTERMEDICS, INC.